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No. 05-785

JUN 22 2005

IN THE

Supreme Court of the United States

THOMAS L. CAREY, WARDEN
Petitioner,

v.

MATHEW MUSLADIN
Respondant.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICI CURIAE* NATIONAL CRIME VICTIM LAW INSTITUTE, PARENTS OF MURDERED CHILDREN, NATIONAL ORGANIZATION OF VICTIM ASSISTANCE, CRIME VICTIM'S LEGAL ASSISTANCE PROJECT AND THE MARYLAND CRIME VICTIMS' RESOURCE CENTER, INC. IN SUPPORT OF PETITIONER

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INTERESTS OF *AMICI CURIAE* [1]

The National Crime Victim Law Institute (NCVLI) is a nonprofit educational organization located at Lewis & Clark

[1] Together with this brief *Amici Curiae* file letters of consent from counsel for both Petitioner and Respondent. *Amici Curiae* states that no counsel for a party authored any part of this brief, and no person or entity other than *Amici Curiae* or its counsel made a monetary contribution to the preparation or submission of this brief.

Law School, in Portland, Oregon. NCVLI's mission is to actively promote balance and fairness in the justice system through crime victim-centered legal advocacy, education, and resource sharing. NCVLI accomplishes its mission through education and training; providing technical assistance to attorneys; promoting the National Alliance of Victims' Rights Attorneys; researching and analyzing developments in crime victim law; and assisting crime victims and other members of the public by providing information on crime victim law. In addition, NCVLI actively litigates issues of national importance regarding crime victims' rights in cases nationwide.

Parents of Murdered Children, Inc. (POMC), was founded by the parents of Lisa Hullinger who was murdered in 1978. POMC is a national nonprofit, self-help support organization based in Cincinnati, Ohio with chapters nationwide. Besides providing support for grieving parents and family members, POMC provides information about the criminal justice system, and seeks to make that system responsive to the needs of the victim's family.

The National Organization for Victim Assistance (NOVA) is a 501(c)(3) membership organization whose mission is to promote rights and services for victims of crime and crisis everywhere. In addition to its membership services, activities in furtherance of its mission are advocacy for victim rights and services, training and other educational resources for victim assistance and allied professionals, and direct service to victims of crime and crisis.

The Crime Victim's Legal Assistance Project (CVLAP) works to ensure that crime victims' federal and state constitutional rights to justice and due process throughout the criminal justice process are recognized, protected, and enforced. To achieve this purpose, CVLAP educates and empowers crime victims through *pro bono* legal advocacy as well as crisis response, education and outreach. CVLAP is the first organization in the country to provide crime victims

with direct *pro bono* legal representation in criminal proceedings. The United States Department of Justice has recognized CVLAP as a model legal clinic site for the nation.

The Maryland Crime Victims' Resource Center, Inc. (the "Center") is a private, non-profit organization incorporated under the laws of the State of Maryland whose mission is to ensure that victims of crime receive justice and are treated with dignity and compassion through comprehensive victims' rights and services. The Center continues the missions of the Stephanie Roper Foundation, Inc. and the Stephanie Roper Committee, Inc., as founded by Roberta and Vince Roper after the kidnapping, sexual assault, and murder of their daughter, Stephanie. For over 23 years, the Center has advocated for policy changes to the justice system and has provided assistance to victims of crime. Those policy changes have included numerous statutory enactments and the adoption of Article 47 of the Declaration of Rights to Maryland's Constitution. The Center advocates increasing the participant status for victims through enforcement of the rights of victims and the concomitant access to justice by those victims.

SUMMARY OF THE ARGUMENT

It is well established that, had he lived, Thomas Studer could have sat quietly in the courtroom throughout defendant's trial, causing no prejudice to defendant's fair trial rights. It belies both logic and the law to conclude that upon his death, the mere image of Thomas Studer became inherently prejudicial. Such conclusion requires a determination that due process, which readily accommodated the presence of crime victims during trial at this country's founding, has evolved to the point where the crime victim's presence is erased from the criminal justice system. Due process has simply not "evolved" so far. To the contrary, legislation now clearly re-recognizes that live victims, however physically devastated from the crime, may constitutionally attend the trial. A button merely displaying the image of a deceased

crime victim, worn by surviving crime victims does not create constitutional prejudice.

The decision below must be reversed.

ARGUMENT

I. CRIME VICTIMS' ATTENDANCE AT TRIAL, WITHOUT MORE, DOES NOT INFRINGE UPON DEFENDANT'S FAIR TRIAL RIGHTS.

This Court has yet to grapple with a situation involving a similar courtroom practice as is presented by the instant case. The two closest cases issuing from this Court are *Estelle v. Williams*, 425 U.S. 501 (1976), and *Holbrook v. Flynn*, 475 U.S. 560 (1986); these cases are inapposite to the instant case. While these cases establish the general rule that some courtroom practices can rise to the level of inherent prejudice, neither case involved a courtroom practice or actor akin to those in the instant case. To the contrary, respectively, these cases dealt with the state compelling a defendant to stand trial in prison clothing, and the state placing uniformed officer in seats behind the defendant.

In a comprehensive law review article on the victim's right to attend criminal proceedings, Professors Douglas Beloof and Paul Cassell conducted a historical survey and found that, throughout the early years of this country, crime victims were routinely permitted to attend criminal trials. *See* Douglas E. Beloof & Paul G. Cassell, *The Crime Victim's Right to Attend the Trial: The Reascendant National Consensus*, 9 Lewis & Clark L. Rev. 481 (2005). This historical right to attend trial was part and parcel of the western legal system's recognition that victims' interests were central to the criminal justice process. *See* Erin Ann O'Hara, *Victim Participation in the Criminal Process*, 13 J.L. & Pol'y 229, 235 (2005); Douglas E. Beloof, *Constitutional Implications of Crime Victims as Participants*, 88 Cornell L. Rev. 282, 286 (2003); Peggy M. Tobolowsky, *Victim Participation in the Criminal Justice*

Process: Fifteen Years After the President's Task Force on Victims of Crime, 25 New Eng. J. on Crim. & Civ. Confinement 21, 21-32 (1999). *See also Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 127-28 (1998) (Stevens J., concurring) (citations omitted) (discussing the historical tradition of relying on the victim to bring a criminal to justice).

In line with this historical American tradition, a majority of states have explicit constitutional or statutory provisions guaranteeing a crime victim the right to attend the criminal trial of the accused.[2] In reviewing court cases interpreting these

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[2] Sixteen states have constitutional or statutory provisions that grant either an absolute or unqualified right to attend trial. *See* Alaska Const. art. I, § 24; Ariz. Const. art. 2 § 2.1(A)(3); Colo. Const. art. II, § 16a; Idaho Const. art. I, § 22; La. Const. art. I, § 25; Mich. Const. art. I, § 24; Miss. Const. art. 3, § 26A (implemented by MISS. CODE ANN. § 99-43-21); Mo. Const. art. I, § 32; Nev. Const. art. I, § 8(2); N.M. Const. art. II, § 24(A)(5); Okla. Const. art. II, § 34; Or. Const. art. I, § 42; S.C. Const. art. I, § 24(A); Tenn. Const. art. I, § 35; Utah Const. art. I, § 28(1); MONT. CODE ANN. § 46-24-106(1). An additional 11 states give victims the right to attend trial explicitly subject to exclusion for interference with the defendant's constitutional rights. *See* Ala. Const. art. I, § 6.01; Fla. Const. art. I, § 16(b); Ind. Const. art. I, § 13(b); Kan. Const. art. 15, § 15; Neb. Const. art. I, § 28; ARK. STAT. § 16-90-1103(a); CAL. PENAL CODE § 1102.6; N.H. REV. STAT. § 21-M:8-k(II)(e) (subject to both the constitutional and statutory rights of the accused); OHIO REV. CODE § 2930.09; VA. CODE §§ 19.2-11.01(4)(b), -265.01; WIS. STAT. §§ 950.04, 906.15. Approximately 10 additional states provide crime victims the right to attend trial subject to other qualifications, including the right to be present unless their testimony is affected, *see* Conn. Const. art. I, § 8; Ill. Const. art. I, § 8.1(A); Tex. Const. art. I, § 30(b); DEL. CODE ANN. tit 11 § 9407; MASS. GEN. LAWS ANN. ch. 258B § 3 preamble, the right to be present if practicable, *see* Md. Const. Decl. of Rights, art. 47; N.C. GEN. STAT. § 15A-832(c), the right to be present subject to the discretion of the court, *see* N.J. Const. art. I. ¶ 22; Wash. Const. art. I, § 35; GA. CODE ANN. § 24-9-61.1; S.D. CODIFIED LAWS § 23A-28C-1; WYO. STAT. ANN. §§ 1-40-203(b), -206, and the right to be present after testifying, *see* VT. STAT. ANN. tit. 13, § 5309, VT. R. EVID. 615 (allowing victim to remain in the courtroom following his or her testimony even if the victim will be called in rebuttal). In addition to these state provisions, Subsection (a)(3) of the

modern attendance rights, Professors Beloof and Cassell determined that, with a single problematic exception,[3] every state and federal court that has considered the issue has rejected a claim that a victim's presence at trial facially violates a defendant's constitutional rights. *See* Beloof & Cassell, *The Crime Victim's Right to Attend the Trial*, 9 Lewis & Clark L. Rev. at 527-34 (and cases cited therein).[4]

Federal Crime Victims' Rights Act (CVRA), 18 U.S.C. § 3771, provides federal victims of crime the right "not to be excluded from any such public court proceeding, unless the court, after receiving clear and convincing evidence, determines that testimony by the victim would be materially altered if the victim heard other testimony at that proceeding."

[3] *See State v. Martinez*, 664 So.2d 1034 (Fla. Dist. Ct. App. 1995). The *Martinez* court found defendant's fair trial rights were violated, but failed to explain how any constitutional violation took place. Moreover, this intermediate appellate court decision appears to conflict with a subsequent state supreme court decision. *See Beasley v. State*, 774 So.2d 649 (Fla. 2000) (concluding that the trial court did not abuse its discretion in refusing defendant's request to sequester homicide victim's family members who would also be witnesses).

[4] *See, e.g., Willis v. Kemp*, 838 F.2d 1510, 1523 (11th Cir. 1988) (explaining that in a habeas proceeding, victim's family's presence at trial did not raise a constitutional issue); *Mathis v. Wainwright*, 351 F.2d 489 (5th Cir. 1965) (concluding that trial court's failure to sequester witnesses "does not raise a question that can be reached by federal habeas corpus, since such denial does not amount to a deprivation of appellant's constitutional rights."); *Landon v. State*, No. A-6479, 1999 WL 46543 at *2 (Alaska Ct. App. Feb. 3, 1999) (unpublished) (collecting cases); *State v. Fulminante*, 975 P.2d 75, 92 (Ariz. 1999) (explaining that in the few reported cases on this issue, a victim's constitutional or statutory right to attend trial does not facially violate defendant's constitutional rights); *Brandon v. State*, 776 S.W.2d 345, 346 (Ark. 1989) (rejecting defendant's claim that reversal was required for failure to sequester the victim because the victim properly exercised her rule-based right to attend trial); *Beasley v. State*, 774 So.2d 649, 669 (Fla. 2000) (concluding that the trial court did not abuse its discretion in refusing defendant's request to sequester homicide victim's family members who would also be witnesses); *State v. Gertsch*, 49 P.3d. 392, 395 (Idaho 2002) (refusing to consider defendant's claim that presence of victim/witness during trial violated his due process

Thus, under well-established modern law, solidly grounded in American history, if Thomas Studer had survived the defendant's bullet he could have attended the trial.[5] In fact, had Mr. Studer survived, and been so seriously physically injured that he needed a wheelchair, or other support device, or had he survived and been visibly scarred, he could have attended the trial. This latter scenario was recently addressed by a California court, which relying in part on victim's right to be present, held that no prejudice existed where a crime

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rights because defendant did not object at trial, and allowing victims to remain in the courtroom and observe the testimony of other witnesses prior to their own testimony did not affect the defendant's due process or fair trial rights); *Wheeler v. Maryland*, 596 A.2d 78, 88 (Md. Ct. Spec. App. 1991) (stating, "Inasmuch as the rule permitting the exclusion of witnesses originated with the legislature, we can conceive of no reason why the rule cannot be modified in the same manner . . . ."); *State v. Harrell*, 312 S.E.2d 230, 236 (N.C. Ct. App. 1984) (explaining that due process does not necessarily require sequestration); *Rucker v. Tollett*, 475 S.W.2d 207, 209 (Tenn. Crim. App. 1971) (in a postconviction proceeding, stating that sequestration of a witness does not raise a constitutional issue); *State v. Beltran-Felix*, 922 P.2d 30, 34-35 (Utah Ct. App. 1996) (explaining that both prosecutor and defendant agreed that a victim's right to attend trial does not facially violate defendant's constitutional rights).

[5] In its original panel decision, the Ninth Circuit referred to Thomas Studer as the "victim"—using quotation marks. *See Musladin v. Lamarque*, 403 F.3d 1072 (9th Cir. 2005) *withdrawn and superceded without change in judgment* 427 F.3d 653 (9th Cir. 2005). The implication of such drafting is that because defendant asserted self defense there could be no victim prior to conviction. Following such logic, had Thomas Studer survived he would not have been a victim for purposes of asserting his rights. This position is contrary to California law. *See* CAL. PENAL CODE § 1102.6 (containing no requirement of conviction and defining victim as "the alleged victim of the offense and one person of his or her choosing or however many more the court may allow under the particular circumstances surrounding the proceeding"). Further, to allow the defense asserted to negate the legal status of victim would eviscerate the victim's rights. *See Bellamy v. State*, 594 So. 2d 337, 338 (Fla. Dist. Ct. App. 1992) (rejecting defendant's argument that because he asserted consent, his accuser could not be classed as a victim).

victim who was paralyzed on the right side and confined to a wheelchair was present during trial. *People v. Newman*, No. B182857, 2006 WL 1331237 (Cal. Ct. App. May 17, 2006) (unpublished). In any of these situations, this Court would have no trouble upholding the constitutionality of the crime victim's attendance.

II. THE MERE IMAGE OF THE CRIME VICTIM WORN ON A SMALL BUTTON IS NOT INHERENTLY PREJUDICIAL.

Challenged courtroom practices are reviewed to determine if "an 'unacceptable risk is presented of impermissible factors coming into play,'" and if such a factor does come into play, there may be inherent prejudice to defendant's fair trial rights. *Holbrook v. Flynn*, 475 U.S. 560, 570 (1986) (quoting *Estelle v. Williams*, 425 U.S. 501, 505 (1976)). This Court has recognized that crime victims have interests in the criminal justice system.[6] Thus, when reviewing the acceptability of a

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[6] *See, e.g., Calderon v. Thompson*, 523 U.S. 538, 555 (1998) (writing for the Court, Justice Kennedy acknowledged that the state and the crime victim share an interest in finality, moral judgment, and the punishment of the guilty); *Payne v. Tennessee*, 501 U.S. 808 (1991) (Scalia, J., O'Connor, J., Kennedy, J., concurring) (acknowledging the re-ascendance of the victims' rights movement, and finding no bar to allowing information that individualizes a victim at sentencing); *Gannett Co., Inc. v. DePasquale*, 443 U.S. 368, 428 (1979) (discussing the educational value of public trials, and noting "the victim of the crime, the family of the victim, others who have suffered similarly, . . . have an interest in observing the course of a prosecution"); *Morris v. Slappy*, 461 U.S. 1 (1983) (noting crime victims' interests in a criminal case); *Snyder v. Massachusetts*, 291 U.S. 97, 120 (1934) (stating, "But justice, though due to the accused, is due to the accuser also. The concept of fairness must not be strained till it is narrowed to a filament. We are to keep the balance true."). This Court's recognition of crime victims' interest in criminal processes is consistent with the understanding of the victim's role noted by William Blackstone, who explained, "[i]n all cases the crime includes an injury: every public offense is also a private wrong, and somewhat more:

challenged courtroom practice, a court must take into account not only a defendant's fair trial rights, but also the interests and rights of the crime victim.

In this case, a photo of the deceased crime victim was worn by Thomas Studer's mother, father, and brother, each of whom was a crime victim with the right to be present at the proceeding.[7] There were no words on the buttons, nor is there evidence that any communicative act was undertaken by Thomas Studer's family.[8] The trial court instructed the jury to not let passion or prejudice influence their verdict.[9] Further, because defendant was on trial for murder, the fact of Mr. Studer's death was not new information to the jury, as it was likely known to all in the courtroom from the moment of impaneling the jury.

This Court has recognized that crime victims are individual human beings and that such individuality has a proper place in the criminal process. *See Payne v. Tennessee*, 501 U.S. 808 (1991). In concurrence in *Payne*, Justices Souter and Kennedy made the commonsense observation that:

> Murder has foreseeable consequences. When it happens, it is always to distinct individuals, and, after it happens,

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it affects the individual, and it likewise affects the community." 4 William Blackstone, Commentaries on the Laws of England 5 (1769).

[7] *See* CAL. PENAL CODE § 1102.6(c) (defining victim for purposes of the right to attend as, "if the victim is no longer living, two members of the victim's immediate family or however many more the court may allow under the particular circumstances surrounding the proceeding.").

[8] This lack of any additional communicative element distinguishes this case from *Norris v. Risley*, 918 F.2d 828 (9th Cir. 1990), which was so heavily relied on by the Court of Appeals for the Ninth Circuit. Consequently, even assuming lower court decisions are "clearly established Federal law, as determined but the Supreme Court of the United States," for purposes of 28 U.S.C. § 2254(d)(1), the decision relied upon by the Ninth Circuit below is factually inapposite.

[9] Joint Appendix (J.A.) 3-4.

> other victims are left behind. . . . Just as defendants know that they are not faceless human ciphers, they know that their victims are not valueless fungibles; and just as defendants appreciate the web of relationships and dependencies in which they live, they know that their victims are not human islands, but individuals with parents or children, spouses or friends or dependents.

Id. at 838-39 (Souter, J., and Kennedy, J., concurring). This Court has further stated, "'No prejudice can result from seeing that which is already known.'" *Estelle v. Williams*, 425 U.S. 501, 507(1976) (quoting *United States ex rel. Stahl v. Henderson*, 472 F.2d 556, 557 (5th Cir. 1973)).

It is *Amici*'s position that a small button, with an in-life photograph of the murder victim worn by family members of the deceased is never prejudicial. Courts confronting courtroom practices that are akin to this case—that is, family of the crime victim merely wearing an image of a deceased crime victim while alive—have routinely found no facial prejudice.[10]

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[10] *See, e.g., Palumbo v. Ortiz*, 89 Fed. Appx. 3, 2004 WL 78212 (9th Cir. 2004) (unpublished) (upholding ruling that family members wearing image of deceased victim in courtroom did not automatically result in prejudice); *State v. Speed*, 961 P.2d 13 (Kan. 1998) (finding no constitutional prejudice where family members wore buttons with image of deceased victim); *State v. Bradford*, 864 P.2d 680 (Kan. 1993) (same); *Vasquez v. State*, No. 03-99-00335-CR, 2000 WL 235156 (Tex. Ct. App. March 2, 2000) (unpublished) (same); *Johnson v. Commonwealth*, 529 S.E.2d 769 (Va. 2000), *vacated and remanded on other grounds* 544 U.S. 901 (2005) (same). Further, even where it is unclear from the record whether it was a family member or merely a spectator wearing the image, courts have held that the mere image of the deceased victim does not, standing alone, create constitutional prejudice. *See, e.g., Kenyon v. State*, 946 S.W.2d 705 (Ark. Ct. App. 1997); *People v. Houston*, 29 Cal. Rptr.3d 818 (Cal. Ct. App. 2005); *State v. Braxton*, 477 S.E.2d 172 (N.C. 1996); *Nguyen v. State*, 977 S.W.2d 450 (Tex. Ct. App. 1998). *Amici Curiae* recognize that these lower court decisions are not dispositive in light of the standard of review required under the Antiterrorism Effective Death

Despite the above, the Court of Appeals for the Ninth Circuit concluded that, upon his death, Mr. Studer's image, standing alone, transformed into something inherently prejudicial to the administration of justice.

In another procedural context, this Court admonished the Court of Appeals for the Ninth Circuit, stating "In its haste to create a novel Sixth Amendment right, the court wholly failed to take into account the interest of the victim of these crimes . . . ." *Morris v. Slappy*, 461 U.S. 1, 14 (1983). In the instant case, the Ninth Circuit has again failed to take crime victims' interests and rights into account, and in so doing has improperly expanded the meaning of constitutional prejudice. A different panel of the Court of Appeals for the Ninth Circuit recently noted that contemporary crime victims' rights are designed to remedy the criminal justice system which previously functioned "on the assumption that crime victims should behave like good Victorian children—seen but not heard." *See Kenna v. United States Dist. Ct. for the Cent. Dist. of Cal.*, 435 F.3d 1011, 1013 (9th Cir. 2006). In contrast to this, the Ninth Circuit opinion in the instant case would ensure that crime victims cannot even be seen. Surely the United States Constitution does not impose such an extreme rule.

Penalty Act, 28 U.S.C. § 2254(d)(1). The cases do, however, demonstrate that the California court's decision was in line with other courts across the country and therefore these cases can inform the reasonableness of that decision. *See Price v. Vincent*, 538 U.S. 634, 642-43 & n. 2 (2003).

CONCLUSION

For the foregoing reasons, and for those provided by Petitioner, the decision of the Court of Appeals for the Ninth Circuit should be reversed.

Respectfully submitted,

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